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No. 14-232

IN THE
Supreme Court of the United States

WESLEY W. HARRIS, ET AL.,
Appellants,

v.

ARIZONA INDEPENDENT
REDISTRICTING COMMISSION, ET AL.
Appellees.

On Appeal from the United States
District Court for the District of Arizona

BRIEF OF APPELLEE ARIZONA INDEPENDENT REDISTRICTING COMMISSION

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QUESTIONS PRESENTED

1. Does the desire to gain partisan advantage for one political party justify intentionally creating over-populated legislative districts that result in tens of thousands of individual voters being denied Equal Protection because their individual votes are devalued, violating the one-person, one-vote principle?

2. Does the desire to obtain favorable preclearance review by the Justice Department permit the creation of legislative districts that deviate from the one-person, one-vote principle? And, even if creating unequal districts to obtain preclearance approval was once justified, is this still a legitimate justification after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)?

LIST OF PARTIES

Appellants are Wesley W. Harris, LaMont E. Andrews, Cynthia L. Biggs, Lynne F. Breyer, Beth K. Hallgren, Lina Hatch, Terry L. Hill, Joyce M. Hill, Karen M. McKean, and Sharese Steffans.

Appellees are the Arizona Independent Redistricting Commission (the "Commission") and Michele Reagan, Secretary of the State of Arizona (the "Secretary").

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OPINIONS BELOW

The district court's *per curiam* opinion and order is reported at 993 F. Supp. 2d 1042 and is reprinted at pages 4 to 81 of the Appendix to the Jurisdictional Statement ("J.S. App.") of No. 14-232.

Judge Silver's separate opinion, concurring in part, dissenting in part, and concurring in the judgment, is reprinted at J.S. App. 82a-104a.

Judge Wake's separate opinion, concurring in part, dissenting in part, and dissenting from the judgment, is reprinted at J.S. App. 105a-145a.

JURISDICTION

The district court's opinion and order affirming Arizona's state legislative map was entered on April 29, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the addendum to this brief.

INTRODUCTION

This should not be a difficult case. Appellants brought a one-person, one-vote challenge to minor population variations—averaging just 2.2%—in Arizona's 2010 state legislative map. Appellants claim the variations resulted from pro-Democratic partisanship on the part of the Arizona Independent Redistricting Commission ("the Commission"). The district court found as fact that the Commission's predominant purpose was not partisanship. And the effects were not partisan either: Elections under the map have mirrored the state's party registration and, if anything, Republicans have modestly *over*achieved.

This Court has long held that *de minimis* population variations in state legislative reapportionment, such as those at issue here, do not implicate the Constitution or require justification by the state. *Connor v. Finch*, 431 U.S. 407, 418 (1977). And even if justification is required, the only question is whether the state acted in "good faith" and "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds v. Sims*, 377 U.S. 533, 577, 579 (1964). The district court correctly concluded that the Commission satisfied that standard, finding after a week-long trial that the minor deviations resulted from the Commission's good-faith efforts to obtain preclearance under Section 5 of the Voting Rights Act and to achieve other traditional state redistricting objectives. Appellants nowhere challenge the district court's factual findings as clearly erroneous. This Court can and should affirm on the basis of the lower court's factual findings alone.

Given the trial court's findings, Appellants are forced to (1) challenge decades of settled precedent by arguing that *any* population deviations, no matter how *de minimis*, require justification, (2) contend that a desire to obtain preclearance under Section 5 of the Voting Rights Act cannot provide a justification for *de minimis* deviations, and (3) further contend that if any of the participants in the line-drawing process had even the slightest partisan motivation, any departure from absolutely perfect population equality is unconstitutional. Appellants' arguments (if endorsed) would prompt challenges to essentially every state, county, and local redistricting plan in the country. This Court should reject Appellants' invitation to radically rewrite the one-person, one-vote doctrine in a manner that would ensure continual and intrusive federal oversight of one of a state's most sovereign functions—legislative redistricting.

STATEMENT OF THE CASE

I. The Arizona Independent Redistricting Commission.

In 2000, by popular initiative, the people of Arizona enacted an amendment to their state constitution, withdrawing redistricting authority from their state legislature and vesting it in the Commission. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) ("*AIRC*"). The Arizona constitution requires that the Commission convene after each decennial census to draw Arizona's congressional and state legislative districts. The Commission consists of five members. "The highest ranking officer and minority leader of each chamber of

[Arizona's] legislature each select one member of the [Commission] from a list compiled by Arizona's Commission on Appellate Court Appointments." *Id.* at 2661. These four politically appointed members then select a chairperson from a list of five candidates who cannot have been registered with either of the two largest political parties in Arizona in the preceding three years. Ariz. Const. art. IV, pt. 2, § 1(5)-(6).

Once constituted, the Commission must draw Arizona's nine congressional and thirty state legislative districts. *Id.* § 1(14). Each of the thirty state legislative districts elects one senator and two representatives. *Id.* § 1(1). To begin the process, the Commission must draw districts in a "grid-like pattern across the state." *Id.* § 1(14). Then, the Commission must adjust districts to advance the specific state interests enumerated in the Arizona constitution. *Id.* § 1(14).

The first state interest is mandatory: Districts must comply with the federal Constitution and the Voting Rights Act. *Id.* § 1(14)(A). The other enumerated goals are secondary and must be accommodated "to the extent practicable." *Id.* § 1(14)(B)-(F). These goals include creating compact and contiguous districts; respecting communities of interest, political subdivisions, and visible geographic features; and pursuing population equality. *Id.* § 1(14)(B)-(E). Additionally, the Commission must make districts more competitive, unless improving competitiveness poses a "significant detriment" to other goals. *Id.* § 1(14)(F); *see also Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep.*

Redistricting Comm'n, 208 P.3d 676, 687 (Ariz. 2009). The Commission may not consider where incumbents or candidates live. Ariz. Const. art. IV, pt. 2 § 1(15). It also may not examine party registration and voting history, except to comply with districting goals enumerated in Arizona's constitution. *Id.* § 1(15).

Once it has completed a draft map, the Commission must advertise the map to the public for comment for thirty days. *Id.* § 1(16). After the public comment period and any final revisions, the Commission approves a final map. *Id.* § 1(16). All of the Commission's work must be completed "in meetings open to the public." *Id.* § 1(12).

II. The 2010 Redistricting Cycle.

During the 2010 redistricting cycle, the five members of the Commission were Richard Stertz and Scott Freeman, the Republican appointees; Jose Herrera and Linda McNulty, the Democratic appointees; and Colleen Mathis, the independent chair. The four politically appointed commissioners unanimously selected Mathis to be chair. J.S. App. 14a.

In approaching their task, all five commissioners recognized that their obligation to comply with the districting principles enumerated in Arizona's constitution would be complicated by the state's idiosyncratic population distribution, its unique history, and its rapidly changing demographics. Nearly 60% of Arizona's population lives in Maricopa County, and many of the state's more rural counties are sparsely

populated.[1] These factors make it difficult to equalize population across Arizona's state legislative districts. Trial Tr. 126:15-17. Moreover, the state contains diffuse communities of interest, including, for example, current and former copper mining communities spanning over 2,000 square miles, *see* Trial Ex. 404 at 139:15-21, and 21 Native American reservations scattered across the state. Arizona has also experienced significant growth in its Hispanic population, which comprised 25.3% of the state's population in 2000 and 29.6% of its population by 2010.[2] Growth in Arizona's Hispanic population accounted for 47.5% of the state's total population growth during this time period.[3]

The Commission's approach to redistricting was thorough and transparent. Over the course of eleven

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[1] *See* United States Census Bureau, 2010 Census: Compare Counties For Population, Housing Units, Area, and Density, http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml (last visited Oct. 21, 2015) (search Arizona in Community Facts search bar).

[2] *Compare* United States Census Bureau, Census 2000: General Demographic Characteristics, *with* United States Census Bureau, 2010 Census: General Population and Housing characteristics, http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml (last visited Oct. 21, 2015) (search Arizona in Community Facts search bar).

[3] *Compare* United States Census Bureau, Census 2000: General Demographic Characteristics, *with* United States Census Bureau, 2010 Census: General Population and Housing characteristics, http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml (last visited Oct. 21, 2015) (search Arizona in Community Facts search bar).

months, the Commission held 58 public meetings and 43 public hearings across the state. These sessions were exhaustive and well attended. They lasted more than 350 hours, attracted more than 5,300 people, and drew more than 1,800 online viewers. At its meetings and hearings, the Commission entertained 2,350 requests to speak from members of the public. The Commission also solicited additional input. The people of Arizona submitted 7,403 written comments and 224 proposed state legislative maps. All of this information guided the Commission's application of the redistricting criteria enumerated in Arizona's constitution.[4]

To evaluate the public testimony it received and navigate the state's geographic and demographic challenges, the Commission adopted an iterative mapmaking process that was at all times guided by the obligation to comply with state and federal law. Each map the Commission considered was made available for public view, as were all underlying data.[5] When the Commission adopted any change to a draft map, it did so in a public forum after the opportunity for detailed discussion. Trial Tr. 413:12-414:14. All discussions

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[4] *See* News Release, Arizona Independent Redistricting Commission, Public Had Strong Influence on Redistricting (Feb. 3, 2012), http://azredistricting.org/News-Releases/docs/020312.pdf.

[5] *See* Arizona Independent Redistricting Commission, http://azredistricting.org/ (last visited Oct. 21, 2015) (navigate through "Maps").

were recorded in transcripts subsequently published on the Commission's website.[6]

Although the commissioners had many debates and disagreements before they approved a draft map (on a 4-1 vote), all but one change to the draft map were approved unanimously. J.S. App. 33a-34a. Many of these changes resulted in deviations from perfect population equality.

A. Compliance With Section 5 Of The Voting Rights Act.

Throughout the 2010 redistricting cycle, Arizona was a covered jurisdiction under Section 4(b) of the Voting Rights Act and therefore subject to the preclearance requirements set forth in Section 5 of the Voting Rights Act. Under Section 5 as it applied at the time, a covered jurisdiction could not implement a redistricting proposal until it was precleared by the Justice Department or the United States District Court for the District of Columbia. 52 U.S.C. § 10304(a). A covered jurisdiction could obtain preclearance only if it could demonstrate that its proposed redistricting plan would not result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). In prior redistricting cycles, Arizona had never obtained preclearance on its first attempt. J.S. App. 24a.

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[6] *See* Arizona Independent Redistricting Commission, http://azredistricting.org/ (last visited Oct. 21, 2015) (navigate through "Meeting Info").

For Arizona, the consequences of failing to obtain preclearance were significant. Such a failure would likely result in holding elections under a map imposed by a federal court, as the state did during the 2000 redistricting cycle. *See Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002). Failure to obtain preclearance would also make Arizona ineligible to "bail out" of its Section 5 obligations for another decade. J.S. App. 24a. And failure to achieve preclearance would impose monetary costs on taxpayers, who would pay for any subsequent litigation and additional rounds of mapmaking. Each commissioner therefore considered obtaining preclearance on the first try to be the Commission's paramount goal. J.S. App. 23a-24a; *see also* Supplemental Appendix to Motion to Dismiss ("Supp. App.") 2, 5, 12-13, 17.

To comply with Section 5, the first task is to identify the "benchmark" number of minority "ability-to-elect" districts—that is, how many districts in the map used during the prior redistricting cycle afforded minorities the ability to elect candidates of their choice. The Justice Department makes this judgment by relying on a functional analysis of census data, group voting patterns, electoral history, voter turnout, and other demographic information. J.S. App. 21a-22a. The Department does not tell covered jurisdictions how many ability-to-elect districts exist in the benchmark map. J.S. App. 22a-23a. Nor does the Department disclose precisely how it performs its functional analysis. *See* J.S. App. 22a; Trial Tr. 983:13-984:11. The Department does not use any bright-line rule for the

percentage of minority population required to establish an ability-to-elect district, and a district can be an ability-to-elect district even if the relevant minority population comprises less than a majority. J.S. App. 22a, 25a, 27a.

Given that it had identified first-try preclearance as a paramount goal, the Commission at the outset of its process attempted to determine the number of ability-to-elect districts in its benchmark map. Consulting data on voting history, turnout, election performance, and racial polarization, the Commission's legal team—which was comprised of attorneys affiliated with both major political parties—concluded that the benchmark map included ten ability-to-elect districts.[7] J.S. App. 27a. The team advising the Commission also included the former Justice Department official who led the team that refused preclearance to Arizona's map in the 2000 redistricting cycle. J.S. App. 25a. Like the Commission's legal team, he ultimately concluded that the benchmark map contained ten ability-to-elect districts. J.S. App. 26a, 30a.

All of the commissioners agreed that the Commission needed ten ability-to-elect districts: nine

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[7] The Commission selected its attorneys through an evaluation process overseen by Arizona's State Procurement Office. J.S. App. 15a. By a 3-2 vote, the Commission selected the most favorably evaluated attorneys to serve as counsel. J.S. App. 15a-16a. Although the dissenting commissioners would have selected different attorneys to represent the Commission, they had no objection to counsel's performance. Trial Tr. 223:22-224:3 (testimony of Commissioner Stertz), 887:6-9 (testimony of Commissioner Freeman).

where Hispanic communities could elect their preferred candidate, and one where Native American communities could elect their preferred candidate.[8] J.S. App. 39a. Thus, "[t]here was not a partisan divide on the question of whether ten districts was an appropriate target." *Id.*[9]

The Commission thus set out to ensure its new map had ten ability-to-elect districts. Throughout the process of creating these districts, the commissioners obtained feedback about how each adjustment to district lines affected other districting criteria, including population deviations. J.S. App. 28a. Counsel advised the Commission that minor population deviations were permissible if they resulted from an attempt to comply with the Voting Rights Act. *Id.* Counsel also advised that minor population deviations were permissible if they resulted from the Commission's pursuit of other state interests, including traditional districting goals like maintaining the integrity of communities of interest and municipal boundaries. Supp. App. 35, 37. Counsel emphasized that the Commission should "try and keep the range [of population deviations] as minimal as possible." Supp. App. 36.[10]

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[8] Commissioner Herrera initially objected to creating a tenth ability-to-elect district but reconsidered his view. Trial Tr. 268:10-269:1.

[9] Indeed, in comments filed with the Commission, counsel for Appellants urged the creation of nine Hispanic majority districts. Joint Appendix ("J.A.") 22a.

[10] Additionally, the Commission's mapping consultant advised that population deviations would shift as the decade progressed. J.S.

On October 10, 2011, by a 4-1 vote, the Commission approved a draft map that attempted to create ten ability-to-elect districts and contained minor population deviations.[11] J.S. App. 28a. The Commission then published its draft map for a period of public comment. On November 29, 2011, the Commission reconvened to consider the public's comments and make final adjustments to the state legislative boundaries.[12] At that time, the Commission reviewed a draft racial polarization analysis from Dr. Gary King, Director of the Institute for Quantitative Social Science at Harvard University. J.S. App. 26a, 30a. Dr. King's initial analysis indicated that the Commission's ten districts would likely offer minorities the ability to elect candidates of choice. J.S. App. 30a. However, the

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App. 31a; Supp. App. 22. The Commission's mapping consultant observed that underpopulated districts containing significant Hispanic populations would likely become overpopulated because the state's Hispanic population was growing at a greater rate than the population of other demographic groups. J.S. App. 31a; Supp. App. 22.

[11] Richard Stertz, the Republican-appointed commissioner who voted against the draft map, felt the Commission could have done more to advance certain districting criteria enumerated in the Arizona constitution. J.S. App. 39a. However, he did not object to population deviations resulting from the Commission's attempt to create ten ability-to-elect districts. J.S. App. 39a.

[12] The public comment period expired on November 9, 2011, but the Commission was delayed in completing its work because the governor and state senate removed Chair Mathis from her post. The Commission could resume its work only after the Arizona Supreme Court held that the removal had no legal basis and reinstated the Commission's independent chair. *See AIRC*, 135 S. Ct. at 2661 n.5.

Commission remained uncertain about whether the Justice Department would reach the same conclusion after conducting its own functional analysis, particularly with respect to legislative district ("LD") 24 and LD26. J.S. App. 30a, 40a; *see also* Supp. App. 38; Trial Ex. 395 at 159:16-177:24.

Over subsequent weeks, the Commission adopted several changes to strengthen the ability-to-elect districts. Each change passed unanimously. J.S. App. 39a. Many were intended to improve ability-to-elect in LD24 and LD26. *See* Def.'s Post-Trial Br. 14-21, ECF No. 219 (discussing changes to each ability-to-elect district). The Commission's adjustments to LD24 and LD26 increased Hispanic voting-age population by 2.3 and 1.6 percentage points, respectively. J.S. App. 31a. Total Hispanic population increased by 2.7 percentage points and 1.7 percentage points, respectively. *Id.* These adjustments also resulted in minor changes to the population deviations that existed in the draft map. J.S. App. 32a. In the Commission's final map, LD24 was underpopulated by 3.0% and LD26 was overpopulated by 0.3%. *Id.*; Supplemental Joint Appendix ("S.J.A.") 59.

The Commission approved its final state legislative map on January 17, 2012.[13] J.S. App. 35a. It then submitted the map for preclearance. *Id.* The Commission intended its submission to present the strongest case for preclearance. As a result, the Commission argued that the benchmark map contained

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[13] The final map passed by a 3-2 vote, with Commissioners Freeman and Stertz voting against the map. J.S. App. 35a.

only seven ability-to-elect districts. J.S. App. 73a-74a. However, the Commission acknowledged that the benchmark map might contain more districts that allowed minorities to elect their preferred candidate and asserted that its map contained ten ability-to-elect districts. J.S. App. 35a; Trial Ex. 530 at 139. The Commission also argued that the map contained another district that offered a Hispanic community some opportunity to elect: LD8. J.S. App. 35a. The Justice Department precleared the Commission's map on April 26, 2012. *Id.*

The Commission's final map includes twelve districts with minor negative deviations from perfect population equality. S.J.A. 59. Ten of these districts offer protected minority groups an ability or opportunity to elect. *See id.*; Trial Ex. 530 at 82-83 (identifying ability-to-elect districts and noting that LD8 increased the likelihood that protected minority groups could elect their preferred candidate relative to benchmark LD23). Of those ten, nine contain a plurality of registered Democrats. S.J.A. 62. Of the remaining two districts with minor negative variations, one contains a plurality of registered Democrats and the other a plurality of registered Republicans. *Id.* The final map has an average deviation of just 2.2% from perfect population equality and a maximum deviation of 8.8%.[14] *See* J.S. App. 9a-10a, 12a.

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[14] Maximum deviation is the total difference in percentage points between the population deviation in the most over- and underpopulated districts. J.S. App. 12a.

B. Pursuit Of Traditional Districting Criteria.

While adjusting the draft map to achieve its paramount goal of first-attempt preclearance, the Commission made simultaneous adjustments to accommodate the other redistricting criteria enumerated in Arizona's constitution "to the extent practicable." Ariz. Const. art. IV, pt. 2, § 1(14)(B)-(F). These criteria included respecting communities of interest, keeping counties together, and improving compactness. Dr. Bruce Cain, a professor of political science at Stanford and the Commission's expert at trial, observed that the Commission effectively implemented these neutral redistricting criteria—for example by drawing compact districts and minimizing city and county splits. J.A. 49a. Many of the adjustments the Commission made to achieve this success resulted, incidentally but inevitably, in deviations from strict population equality. J.A. 28a.

LD2 is illustrative. LD2 is an ability-to-elect district in southern Arizona that incorporates parts of the city of Tucson and Santa Cruz County, which borders Mexico. S.J.A. 56, 58. After reconvening to adjust its draft map, the Commission adopted several modifications to LD2's boundaries. Each promoted a neutral districting goal, but effected some population deviation. To make the district more compact and unify a political subdivision, the Commission shifted a portion of Cochise County from LD2 into the neighboring LD14, which encompassed the rest of Cochise County. Supp. App. 2-4, 32-33. To protect communities of interest, the Commission altered boundaries in several

areas, like Rita Ranch (a residential area split between two districts in the draft map). Trial Ex. 405 at 86:16-110:16. Some of these changes removed population from LD2 and others added population. *Compare* Supp. App. 2-4, *with* Trial Ex. 405 at 97:5-10. On balance, the changes resulted in a more negative—but still minor—deviation from perfect population equality. LD2 was underpopulated by 0.1% in the draft map and by 4.0% in the final map. *Compare* Trial Ex. 420 at 217-218, *with* S.J.A. 59.

Other changes designed to effectuate neutral redistricting principles also resulted in minor negative population deviations. For example, the Commission accommodated several communities that requested to be moved out of LD7, the district designed to allow Arizona's Native American communities to elect a candidate of their choice. *See* Supp. App. 3-4, 7-8. These changes unified the non-reservation portions of one county (Mohave) and maintained the entirety of another rural county (Greenlee) in a different district. *See* Supp. App. 7-8. Each change required removing population from the district, which deviated from strict population equality by 1.3% in the draft map, and 4.7% in the final map. *Compare* Trial Ex. 420 at 217, *with* S.J.A. 59.

To implement neutral districting principles, the Commission also adjusted district boundaries in other ability-to-elect districts, including three districts in the Phoenix area: LD24, LD29, and LD30. In LD24, the Commission removed the Fort McDowell reservation, situating it in LD23 at the request of reservation leaders. Trial Ex. 403 at 57:4-6. In LD29 and LD30,

the Commission made technical adjustments before adopting its final map, several of which required removing population to avoid splitting county voting precincts, at the request of county officials. Trial Tr. 786:5-787:13; Trial Ex. 420 at 466, 479-80. Each of these decisions advanced a neutral districting goal. Each also resulted in a slight departure from perfect population equality.

Districting criteria enumerated in Arizona's constitution were often at odds with perfect population equality. As one commissioner stated in an early public hearing: "[E]very time you move a district to refine a population imbalance, you end up changing all the other districts." Trial Ex. 358 at 109:5-7; *see also* J.A. 28a (expert report of Bruce Cain). For example, LD12 is located in the eastern part of the Phoenix metropolitan area. It is not an ability-to-elect district. LD12 was overpopulated for several reasons, including the Commission's decisions to protect the integrity of several political subdivisions. Trial Ex. 406 at 217:3-21. At least one member of the Commission attempted to reduce the population deviation in LD12, but found the Commission could not do so without undermining other neutral districting principles. *Id.* Ultimately, the Commission decided it could not reduce the population deviations in LD12 without compromising other principles.

Although the Commission could not eliminate all minor population deviations without upsetting its

pursuit of other traditional districting criteria,[15] members of the Commission recognized their obligation to minimize deviations under state and federal law. Before it approved a final map, the Commission reduced already minor population deviations in several districts. Supp. App. 34-35; 41-47. For example, on December 16, 2011, the Commission made changes that reduced the total population deviation in LD1 by 3 percentage points, in LD6 by 4.2 percentage points, in LD9 by 4.8 percentage points, and in LD14 by 1.8 percentage points. Supp. App. 45-47. These changes, and others,[16] reduced the average deviation in the Commission's final map to just 2.2%. J.S. App. 9a-10a. The Commission's final map contained a maximum deviation of only 8.8%, J.S. App. 12a, well within the norm of deviations observed in other jurisdictions.[17]

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[15] There is no evidence the Commission could have implemented traditional districting criteria as it did and further reduced population deviations. Appellants offered as a purported alternative the state legislative map drawn by their expert, Dr. Thomas Hofeller. But, as the court below found, Dr. Hofeller's map presented no viable alternative because it did not take into account *any* traditional districting criteria and contained only eight ability-to-elect districts, none of which had been evaluated using racial polarization data. J.S. App. 74a-75a.

[16] *See, e.g.*, Trial Ex. 406 at 214:2-215:8, 221:23-225:17 (discussing population balancing in LD16 and LD25).

[17] *See* National Conference of State Legislatures, 2010 NCSL Congressional and State Legislative Redistricting Deviation Table, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Oct. 21, 2015).

C. Lack Of Partisan Bias.

Throughout the mapmaking process, members of the Commission worked jointly and often by consensus to balance the districting criteria identified in Arizona's constitution. *See, e.g.*, Trial Ex. 405 at 70:2-17 (consensus in accommodating communities of interest in Maricopa County); Trial Ex. 406 at 207:16-208:19 (consensus in implementing traditional districting criteria in LD5, LD9, LD10, LD13, and LD14); *id.* at 204:24-205:10 (consensus in revising LD13 and protecting political subdivisions). The population deviations at issue in this case arose in the modifications the Commission made between approval of the draft map and approval of the final map. During that time, the Commission made several changes to effectuate the districting goals enumerated in Arizona's constitution. The only change adopted by a divided vote concerned LD8. J.S. App. 34a.

As to LD8, one of the Democratic-appointed commissioners suggested altering the district's boundaries to make it more competitive. J.S. App. 32a. She later suggested the proposed changes might create an ability-to-elect district. J.S. App. 33a. The Commission's Voting Rights Act consultant agreed that the proposed changes might transform LD8 into an ability-to-elect district. J.S. App. 33a, 42a. The Commission's counsel advised that presenting an additional ability-to-elect district could help the Commission obtain preclearance because the Justice Department might question whether LD26 in fact offered an ability to elect. J.S. App. 33a, 42a. Only after receiving this guidance did the Commission—in a

divided vote—approve the proposed changes to LD8, which increased the Hispanic community's district-wide share of the voting age population from 22.8% to 31.3%, and its district-wide share of the total population from 25.9% to 34.8%. J.S. App. 34a, 42a. The revisions to LD8 resulted in changing the population deviation from 1.5% over the ideal to 2.3% less than the ideal. J.S. App. 34a. Without any reference to the population deviations, the Republican-appointed commissioners disagreed with the revisions made to LD8, which they perceived as changing a Republican-leaning district into a Democratic-leaning district. *Id.*[18]

Ultimately, however, the map the Commission adopted fairly reflected the partisan balance of the state, with a slight pro-Republican bias. In June 2012, the Republican Party's share of Arizona's state-wide two-party registration was 54.4%. J.S. App. 98a. In the 2012 election, the Republican Party won 60% of House seats and 57% of Senate seats.[19] In the 2014

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[18] The record also shows that the Commission adopted the proposed changes to LD8 in part to advance neutral districting principles. The changes preserved the core of benchmark LD23, which had elected several Hispanic candidates of choice during the previous decade. J.S. App. 33a; Supp. App. 39. The changes also protected a community of interest by uniting Arizona's copper corridor communities. Supp. App. 14-15.

[19] Arizona Secretary of State, State of Arizona Official Canvass (Dec. 1, 2014), http://apps.azsos.gov/election/2012/General/Canvass2012GE.pdf. The Republican candidate for president in 2012 won 53.1% of statewide votes. *Id.*

election, the Republican Party again won 60% of House seats and 57% of Senate seats.[20]

III. Procedural History.

Appellants are Arizona voters. According to 2010 census data, they reside in state legislative districts that were overpopulated in the Commission's final map. Appellants contend the Commission intentionally overpopulated their districts for impermissible partisan purposes. Harris Br. 2.

Appellants' claims were tried before a three-judge panel convened in the District of Arizona. The panel held a five-day trial and received testimony from nine witnesses, including all five members of the Commission. J.S. App. 8a. The panel also received hundreds of trial exhibits, which it reviewed in conjunction with transcripts of the Commission's public hearings. *Id.*

After making meticulous findings of fact based on the testimony and evidence received at trial and information contained in the public record, a 2-1 majority of the district court concluded that minor population deviations in the Commission's final state legislative map resulted predominantly from the Commission's legitimate consideration of two rational state interests: securing preclearance and accomplishing neutral districting goals. J.S. App. 24a. Although Judge Clifton found that partisanship *may*

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[20] Arizona Secretary of State, State of Arizona Official Canvass (Dec. 1, 2014), http://apps.azsos.gov/election/2014/General/Canvass2014GE.pdf.

have played a role in the creation of ability-to-elect districts, and played some role in alterations to LD8, he and Judge Silver agreed that minor population deviations in the Commission's final map were predominantly motivated by legitimate non-partisan considerations. J.S. App. 36a, 63a n.10.[21] Judges Clifton and Silver further held that this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), did not invalidate voting lines drawn in part to achieve preclearance pursuant to Section 5 of the Voting Rights Act. J.S. App. 69a-72a. Accordingly, the majority held that Appellants failed to establish their equal protection claim. J.S. App. 81a.

Judge Silver concurred in the result, but wrote separately to set forth her views, including her finding that there was no evidence of partisanship in the Commission's final map. J.S. App. 96a-104a. Judge Silver further noted that allegations of partisan bias likely could not supply a cognizable basis for

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[21] The court below divided on Appellants' burden of proof. Judge Silver concluded that Appellants were required to show that minor population deviations resulted solely from illegitimate considerations. J.S. App. 94a. Judge Clifton concluded that Appellants were required to show that illegitimate reasons for population deviations predominated over legitimate ones. J.S. App. 63a n.10. Judge Wake concluded that Appellants were required to show that legitimate purposes could not account for the entirety of each deviation. J.S. App. 139a. Because Judge Silver found no evidence that the Commission acted with improper partisan intent, J.S. App. 96a-104a, she necessarily agreed that Appellants failed to satisfy the predominance test and the majority found it unnecessary to resolve the issue of Appellants' burden. J.S. App. 63a n.10.

Appellants' one-person, one-vote claim. J.S. App. 88a-93a.

Judge Wake dissented from the judgment of the Court. He concluded that the Commission's desire to obtain preclearance was not a legitimate state interest, both before *Shelby County* and because of it. J.S. App. 125a; 129a. He also concluded that minor population deviations in the Commission's final state legislative map were motivated by partisanship, J.S. App. 119a-121a; that partisanship is not a traditional districting criteria sufficient to justify population deviations under this Court's one-person, one-vote doctrine, J.S. App. 117a-118a; and that Appellants had established an equal protection violation, J.S. App. 109a.

This appeal followed. On June 30, 2015, this Court noted probable jurisdiction over the three questions presented in Appellants' Jurisdictional Statement. On July 2, 2015, this Court limited briefing to questions one and two.

SUMMARY OF ARGUMENT

Appellants brought a one-person, one-vote challenge to Arizona's 2010 state legislative map, alleging that the map's minor deviations from perfect population equality resulted from the Commission's pro-Democratic partisanship. The district court rejected that claim and found as fact that the deviations resulted primarily from the Commission's good-faith efforts to obtain Section 5 preclearance and comply with other neutral state redistricting objectives. This Court should affirm. The district court's judgment follows ineluctably from half a century of this Court's

precedent and from factual findings that Appellants do not—and cannot—challenge as clear error.

I.A. The minor population deviations here—an average of 2.2% and a maximum of 8.8%—do not implicate the Equal Protection Clause. For state legislative districts, the one-person, one-vote principle requires "substantial" equality, not perfect equality. *Reynolds*, 377 U.S. at 579. Accordingly, this Court has long held that "under-10% deviations" in such districts are *de minimis* and generally do not require justification by the state. *Connor*, 431 U.S. at 418. Indeed, just last Term, this Court reaffirmed that deviations of plus or minus 5% are "generally permissible." *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015) ("*ALBC*") (noting that map attempting to achieve smaller deviations was applying "a more rigorous . . . standard than [the Court's] precedents have found necessary under the Constitution"). That rule protects a core sovereign function of states against endless superintendence by federal courts. It properly recognizes that a narrow focus on perfect equality would "submerge" other goals that states may legitimately pursue in crafting representation in state legislatures, such as keeping political subdivisions intact and preserving communities of interest. *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). Given these pervasive state interests, the Court has held that the Equal Protection Clause is not concerned with minor deviations that could easily result from measurement errors or population changes over decade-long redistricting

cycles. *See id.* at 745-46, 749. This appeal can and should end there.

B. Appellants' only response is to point to the summary affirmance in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (*per curiam*), *summarily aff'd*, 542 U.S. 947 (2004), but that decision did not alter the half century of precedent just described. This Court routinely cautions that such affirmances "should not be understood as breaking new ground." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). And that rule should apply with special force here. The district court's judgment in *Larios* turned on its finding that the legislature intentionally abused the 10% rule to maximize population deviations throughout the state for partisan gain and did not pursue equality in good faith. 300 F. Supp. 2d at 1352. There is nothing even approaching such a finding here, so *Larios* is entirely inapposite. Moreover, this Court's subsequent decision in *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), confirmed that *Larios* did not alter the controlling rule about when there is a need for justification of *de minimis* population deviations. *Id.* at 422-23.

II.A. To the extent justification for the *de minimis* variations here was even required, the district court found after a full trial that the Commission's redistricting decisions were predominantly motivated by the desire to comply with Section 5, to obtain preclearance from the Justice Department, and to implement the state constitution's districting criteria. J.S. App. 24a, 36a. That finding is reviewable here only for clear error, and the standard is especially

deferential because the district court's conclusion turned in part on witness credibility. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). Although Appellants rely relentlessly on innuendo about partisanship and race, they do not even attempt to show that the district court's rejection of their allegations was clear error.

B. A desire to obtain Section 5 preclearance is plainly a "legitimate consideration[] incident to the effectuation of a rational state policy"—all that is required to justify minor population deviations like those here. *Reynolds*, 377 U.S. at 579. This Court has held that any number of "substantial and legitimate state concerns" can satisfy this standard. *Brown v. Thomson*, 462 U.S. 835, 843 (1983). The traditional districting principles recognized by this Court include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *ALBC*, 135 S. Ct. at 1270 (internal quotation marks omitted); *see Brown*, 462 U.S. at 842.

Arizona's interest in obtaining Section 5 preclearance is at least as weighty as those this Court has endorsed. When Arizona prioritized preclearance, it simultaneously complied with federal law and vindicated the state's sovereign authority over its elections by keeping the people's representatives, not federal courts, in control. That choice was both "legitimate" and "rational." *Reynolds*, 377 U.S. at 579. Indeed, eight Justices have found that Section 5 compliance is a *compelling* interest, and so necessarily a rational one. *See generally LULAC*, 548 U.S. 399. It

is nonsensical to assert, as Appellants do, that Arizona's map would be unobjectionable had it been drawn *only* to (for example) preserve municipal lines, but that it is subject to invalidation because the Commission also pursued Section 5 preclearance.

C. This Court's decision in *Shelby County* does not require the invalidation of all redistricting plans drawn to comply with Section 5. That decision overturned the coverage formula because the Court found it imposed unjustified burdens on the "residual sovereignty of the States" over their elections by subjecting states to federal oversight. 133 S. Ct. at 2623 (quotation marks omitted). It would be perverse indeed to hold that *Shelby County* then licensed federal courts to invalidate every map—for every state, city, county, board of education, and so on—that was drawn to comply with Section 5. It is for Arizona, not Appellants or the courts, to decide whether and how the state should redraw its legislative maps in light of *Shelby County*.

III.A. The Court need not and should not address Appellants' other question presented. That question rests on a factual premise—that the population deviations here resulted from the Commission's "desire to gain partisan advantage"—that the district court rejected after a year of reviewing the evidence and hearing testimony presented at trial. Appellants do not challenge the district court's fact-finding as clearly erroneous, and it plainly is not. There is no reason for the Court to weigh in on Appellants' counterfactual question presented.

B. If the Court reaches this issue, it should reject Appellants' position. Federal courts need not invalidate every map in which partisan considerations may have played some role in increasing population deviations. As this Court has recognized, partisan considerations are just as pervasive in state legislative redistricting as are departures from perfect equality. *See Gaffney*, 412 U.S. at 752 ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary."). Indeed, this Court has recognized "political affiliation" as a "traditional" districting criterion. *ALBC*, 135 S. Ct. at 1270. This precedent cannot be squared with Appellants' position, which would require states *either* to draw maps with perfect population equality (despite the Court's recognition that such perfection is not required for state legislative districts), *or* to undertake the impossible task of banishing politics from districting (lest any deviation, however trivial, be found to have resulted from politics). The Court should not endorse the sea change in doctrine that Appellants seek.

ARGUMENT

I. The Population Deviations At Issue Fall Well Within Those The Court Has Held Are Generally Permissible And Do Not Require Justification Under The Equal Protection Clause.

The district court correctly found that the Commission did not violate the Equal Protection Clause when it adopted a state legislative redistricting

plan that contained minor population deviations. This Court has repeatedly held that maximum population deviations of less than 10% are *de minimis* and do not require justification by the state. This rule has been applied with near uniformity by this Court and lower courts for over fifty years. Appellants' argument would undermine decades of consistent precedent and create an incoherent rule subjecting nearly every state's legislative apportionment plan to increased constitutional scrutiny and fact-intensive oversight by federal courts.

A. This Court Has Never Held That A State Must Justify Population Deviations Of Less Than 10% In A State Legislative Redistricting Plan.

The Equal Protection Clause's requirement that state legislative districts "be apportioned on a population basis" demands "substantial" population equality, not perfect equality. *Reynolds*, 377 U.S. at 576, 579. Although a state must "make an honest and good faith effort" to construct state legislative districts "as nearly of equal population as is practicable," the Court's jurisprudence has long recognized that "[m]athematical exactness or precision is hardly a workable constitutional requirement." *Id.* at 577. This standard reflects the Court's conscious decision to afford states "broader latitude" in drawing their own legislative districts than exists in congressional

districting. *Mahan v. Howell*, 410 U.S. 315, 321-22 (1973).[22]

Population deviations under 10% in legislative district plans are considered *de minimis* population variances that generally do not require state justification. *Connor*, 431 U.S. at 418. Indeed, just last Term, this Court reaffirmed five decades of consistent precedent holding that deviations of plus or minus 5% are "generally permissible" and that a state plan that intentionally set out to achieve a maximum deviation of no more than 2% was striving to achieve a "more rigorous . . . standard than [the Court's] precedents have found necessary under the Constitution." *ALBC*, 135 S. Ct. at 1263 (citation omitted).

This is because the Court does "not consider relatively minor population deviations among state

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[22] Unlike deviations in state legislative districts, population deviations among congressional districts generally do require justification. In *Karcher v. Daggett*, this Court held that if a plaintiff can show there are deviations among congressional districts that "could practicably be avoided," 462 U.S. 725, 734 (1983), then the state must "show with some specificity" that the population differences "were necessary to achieve some legitimate state objective." *Id.* at 740. This burden is a "flexible" one, which "depend[s] on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.* at 741. However, even as to congressional districts, this Court has recently cautioned lower courts on the need "to afford appropriate deference to [a state's] reasonable exercise of its political judgment" in districting. *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 5 (2012) (*per curiam*).

legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation." *White v. Regester*, 412 U.S. 755, 764 (1973); *see also Gaffney*, 412 U.S. at 749 ("We doubt that the Fourteenth Amendment requires repeated displacement of otherwise appropriate state decisionmaking in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature."). As the Court in *Brown v. Thompson* summarized:

> [W]e have held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.

462 U.S. at 842-43 (quoting *Gaffney*, 412 U.S. at 745); *see also Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993); *ALBC*, 135 S. Ct. at 1263.

This Court has rejected a more stringent standard of mathematical precision, first, in order to protect the quintessential sovereign functions that states exercise when they draw their own legislative districts. States have long exercised this sovereign discretion to maintain the integrity of subdivisions, to preserve the

cores of prior districts, and to pursue myriad other interests—all of which is ill-suited to superintendence by the federal judiciary.[23] *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Mahan*, 410 U.S. at 324-25; *Reynolds*, 377 U.S. at 586. State apportionment decisions are often made mindful of factors other than eliminating "insignificant population variances," and "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations." *Gaffney*, 412 U.S. at 748-49. For this reason, courts must avoid "becom[ing] bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Id.* at 750.

Second, this Court's standard recognizes that mathematical exactitude is "a practical impossibility." *Reynolds*, 377 U.S. at 577. Ideal population figures are based on census population data, which is a snapshot in time of the number of persons in a given district, and which fluctuates during the decade-long cycle throughout which the districts typically exist. *See Reynolds*, 377 U.S. at 583 (finding this "prescribed practice" of reapportioning districts every ten years a "rational approach" that is constitutionally sufficient); *LULAC*, 548 U.S. at 421 (noting that "[s]tates operate under the legal fiction that their plans are

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[23] As this Court held last term, the Commission holds the state's sovereign authority to reapportion state legislative districts. *AIRC*, 135 S. Ct. at 2659, 2677. Appellants' argument that the "principle of deference to sovereign state legislatures does not apply" to the Commission, Harris Br. 56, is in direct contravention of that decision.

constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting"). Thus, "[i]t makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted. The 'population' of a legislative district is just not that knowable to be used for such refined judgments." *Gaffney*, 412 U.S. at 745-46. Any other conclusion would require continuous redistricting and prove unworkable for both states and the courts.

The resulting rule is clear and easily applied. As a matter of course, both this Court and lower courts throughout the country have upheld state legislative apportionment plans with deviations of less than 10%, finding that such *de mimimis* deviations do not implicate equal protection concerns. *See, e.g., Gaffney*, 412 U.S. at 751, 754 (upholding state legislative plan with 8% maximum population deviation); *White*, 412 U.S. at 761 (same with 9.9% deviation); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 365, 371 (S.D.N.Y. 2004) (same with 9.78% deviation), *summarily aff'd*, 543 U.S. 997 (2004); *Cecere v. Cnty. of Nassau*, 274 F. Supp. 2d 308, 311 (E.D.N.Y. 2003) (same with 8.94% deviation); *see also Connor*, 431 U.S. at 418; *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1031 (D. Md. 1994) (holding that "there is no burden on the State to justify [a] deviation" of less than 10%).[24]

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[24] Appellants misleadingly note that in *Chapman v. Meier*, 420 U.S. 1, 25-26 (1975), this Court stated that a population deviation of 5.95% may not "necessarily . . . be permissible." *See* Harris Br. 51-52. Nothing about the dicta in that case—in which the Court

But see Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) *(per curiam)*, *summarily aff'd*, 542 U.S. 947 (2004). Consistent with this long line of precedents, the 8.8% maximum population in the Commission's apportionment plan is a *de minimis* deviation that is "insufficient . . . to require justification by the State." *Brown*, 462 U.S. at 842-43 (quotation marks omitted).

B. This Court's Summary Affirmance In *Larios v. Cox* Did Not Change The Law That The Deviations At Issue Here Do Not Require Justification.

Appellants generally ignore this Court's five decades of precedent allowing minor population deviations such as those at issue here. Appellants focus instead on the summary affirmance of the district court's decision in *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) *(per curiam)*, *summarily aff'd*, 542 U.S. 947 (2004), the lone case overturning a state legislative apportionment plan with less than a 10% population deviation. The Court's summary affirmance in *Larios* does not change the law.

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struck down a court-ordered reapportionment plan with a maximum deviation of over 20%—alters the general rule that under-10% deviations in state legislative reapportionment plans drawn by the state entity authorized to conduct redistricting are presumptively constitutionally valid. *See Chapman*, 420 U.S. at 22; *see also Connor*, 431 U.S. at 414 (court-ordered apportionment plans are held to a stricter standard than legislatively drawn plans); *AIRC*, 135 S. Ct. at 2673 (Arizona's independent redistricting commission is equivalent to a state legislative body for reapportionment purposes).

As an initial matter, this Court does not make new law in a summary affirmance like *Larios*. "A summary affirmance is not to be read as a renunciation by this Court of doctrines previously announced in [the Court's] opinions after full argument." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1800-01 (2015) (internal quotation marks omitted) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, CJ., concurring)). "Summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Mandel*, 432 U.S. at 176. Accordingly, a summary affirmance has "considerably less precedential value than an opinion on the merits." *Wynne*, 135 S. Ct. at 1800 (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 180-81 (1979)).

Moreover, the *Larios* summary affirmance has no relevance here given the chasm between that case and this one. In *Larios*, the district court found that the legislature intentionally abused the 10% rule to maximize statewide population deviations for partisan gain. *See* 300 F. Supp. 2d at 1352. Unlike the Commission here, the Georgia state legislature in *Larios* did not make any good-faith effort to equalize population. Instead, the legislators "pushed the deviation as close to the 10% line as they thought they could get away with." *Id.* They did so to promote regionalism, protect incumbents of one party, and pit incumbents of the other party against one another. *Id.* And the creators of the Georgia state plans in *Larios*—again, unlike the commissioners here—"did not

consider such traditional redistricting criteria as district compactness, contiguity, protecting communities of interest, and keeping counties intact." *Id.* at 1325. "Rather, they had two expressly enumerated objectives: the protection of rural Georgia and inner-city Atlanta against a relative decline in their populations compared with that of the rest of the state and the protection of Democratic incumbents." *Id.* This case is nothing like *Larios*, and Appellants' attempt to extract a novel legal rule from the Court's summary affirmance should be rejected.

This Court's subsequent decision in *LULAC* confirms that *Larios* does not have the broad significance Appellants attribute to it. *LULAC* reaffirmed, first, that a state's justification for a population disparity becomes relevant only *after* plaintiffs have established a *prima facie* equal protection violation and, second, that the deviation alone is not sufficient to establish such a violation:

> Because appellants have not demonstrated that the legislature's decision to enact Plan 1374C constitutes a violation of the equal-population requirement, we find unavailing their subsidiary reliance on *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (*per curiam*), *summarily aff'd*, 542 U.S. 947 (2004).... The *Larios* holding and its examination of the legislature's motivations were relevant *only in response* to an equal-population violation, something appellants have not established here.

548 U.S. at 422-23 (emphasis added). Thus, to the extent that any principle can be drawn from *Larios*,

LULAC clarified that, at most, *Larios* can be read to require state justification of population deviations under 10% when the plaintiff has already shown a *prima facie* equal protection violation based on factors other than the deviation itself. Appellants have not done so here, and *Larios* does not stand for the proposition that population deviations of less than 10% will always require state justification.

* * *

Appellants failed to establish a *prima facie* equal protection violation that would require justification by the Commission. The small population variations here are well within what this Court has deemed generally permissible, and Appellants produced nothing *other* than the variations themselves that could demonstrate a *prima facie* violation. *See infra* Part III. Indeed, Appellants explicitly rely on the deviations alone as their proposed "trigger for this Court's scrutiny." Harris Br. 55. The Court can and should affirm on this basis alone.

II. Even Assuming That Justification Was Required, The Trial Court Correctly Found That The Population Deviations Were Justified.

Even if the *de minimis* population deviations in Arizona's state legislative maps require explanation, the court below correctly found that the deviations were justified by the Commission's desire to achieve preclearance and adhere to Arizona's constitutionally prescribed redistricting criteria. This Court's precedent confirms that those interests are more than

sufficient to serve as "legitimate considerations incident to the effectuation of a rational state policy," *Reynolds*, 377 U.S. at 579, which is all that is required.

A. The Trial Court Correctly Found That The Reason For The Minor Deviations Was The Commission's Desire To Achieve Preclearance And Adhere To Traditional Districting Criteria.

The court below found that the Commission's redistricting decisions were predominantly motivated by the desire to comply with Section 5 of the Voting Rights Act, to obtain preclearance from the Justice Department, and to implement the state constitution's redistricting criteria. J.S. App. 24a, 36a. This factual finding is entitled to deference and reviewed only for clear error. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 744 (1983); *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982). Accordingly, it must be upheld so long as it "falls within [the] broad range" of conclusions permitted by the record developed at trial. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 400 (1990).

This standard reflects an obvious truth: that district courts enjoy greater proximity to the testimony and evidence probative of intent. The district court's unique vantage point is particularly critical where, as here, factual findings turn in part on the credibility of witnesses. *Anderson*, 470 U.S. at 575 ("[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that

finding, if not internally inconsistent, can virtually never be clear error.").

The court below presided over five days of trial. J.S. App. 8a. It heard live testimony from all five commissioners and the parties' experts. J.S. App. 8a, 74a; Trial Tr. 925-1025. It also reviewed deposition testimony from the Justice Department attorney involved in the review and rejection of the Commission's 2002 state legislative map, J.S. App. 25a; Trial Tr. 692:2-5, as well as the special master appointed to revise that map. Trial Tr. 925-1025; 926:20-23. The panel questioned witnesses and counsel at length. *See, e.g.*, Trial Tr. 1177-1263. It scrutinized the Commission's grid, draft, and final state legislative maps, as well as the population statistics and other statistical information for each district in each map. And it reviewed transcripts of the Commission's public hearings. *See* J.S. App. 8a. Put simply, the court below was very well positioned to make nuanced factual judgments about the Commission's intent.

Following its exhaustive review, the majority below found that population deviations in the Commission's final map resulted from the Commission's good-faith pursuit of legitimate redistricting goals. J.S. App. 24a, 36a. With respect to compliance with Section 5, the court found that the Commission's efforts to avoid retrogression were not a pretext for partisan vote dilution. J.S. App. 36a. The court also found that all commissioners believed that to achieve preclearance, they needed to create and subsequently strengthen ten ability-to-elect districts. J.S. App. 39a-40a. The conclusion that the Commission was at all times acting

in good faith finds further support in the Commission's consistent efforts to mitigate the already minor population deviations that resulted from its attempts to balance non-retrogression and traditional districting goals. *See, e.g.*, Supp. App. 34-35; 41-47.

Nowhere in their briefs do either Appellants or the Secretary contend that the trial court's factual findings about the Commission's intent are clearly erroneous. Both parties ignore the trial court's finding that *de minimis* departures from perfect population equality resulted incidentally from the Commission's honest pursuit of legitimate state interests. And both attempt to relitigate this case on appeal, making naked assertions about partisan or racial motivations without citing the record to support their claims. *See, e.g.*, Harris Br. 21; Secretary's Br. at 20. This, of course, is impermissible. *See Teva Pharmas. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015); *Anderson*, 470 U.S. at 573-74; *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 123 (1969).[25]

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[25] In their attempt to relitigate this case, Appellants try to convince this Court that the Justice Department would have granted preclearance even if the Commission created only seven ability-to-elect districts. Harris Br. 45. But as the court below found, there is no evidence supporting that proposition. J.S. App. 73a-75a. To the contrary, the court determined that the Commission's decision to try to achieve ten ability-to-elect districts was appropriate in light of Arizona's unique historical and political circumstances, including past failures to obtain preclearance and the state's constitutionally expressed preference for voting under maps designed by the Commission. J.S. App. 23a-25a, 75a-76a. Because the trial court's finding reflects its familiarity with Arizona's unique history and its appraisal of

B. A Desire To Achieve Preclearance And Comply With Section 5 Is A Legitimate State Interest Incident To The Effectuation Of A Rational State Policy.

Appellants claim that the Commission's desire to obtain preclearance cannot justify the creation of legislative districts with even minor deviations from perfect population equality. Harris Br. 42. But the Commission's desire to obtain preclearance under Section 5 is plainly a "legitimate consideration[] incident to the effectuation of a rational state policy" that justifies such deviations. *Reynolds*, 377 U.S. at 579. Obtaining preclearance was required under state and federal law, and ensured that the map used on election day was drawn by those exercising the people's delegated authority, *AIRC*, 135 S. Ct. at 2671, not by a federal court.

1. The Desire To Achieve Section 5 Preclearance Is A Sufficient Interest To Justify Minor Population Variations.

Out of respect for state sovereignty, this Court has crafted a standard that is intentionally forgiving of minor population variations in state legislative districts. So long as the variation resulted from action taken "in good faith" and "based on legitimate considerations incident to the effectuation of a rational state policy," *Reynolds*, 377 U.S. at 579, the one-person, one-vote guarantee is met. This standard (once again)

Arizona's local needs, it is especially worthy of deference. *See, e.g.*, *Rogers*, 458 U.S. at 622 (quoting *White*, 412 U.S. at 769-770).

recognizes the greater "flexibility" and "broader latitude [that] has been afforded the States" in this realm. *Mahan*, 410 U.S. at 321-22. Consistent with the standard's relative leniency, this Court has held that any number of "substantial and legitimate state concerns" can satisfy this standard. *Brown*, 462 U.S. at 843. The traditional districting principles recognized by this Court include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation." *ALBC*, 135 S. Ct. at 1270 (internal quotation marks omitted); *see Brown*, 462 U.S. at 842. These interests are hardly compelling, but they indisputably clear the modest hurdle that applies. *Cf. Mahan*, 410 U.S. at 326 (the "proper . . . test is not framed in terms of 'governmental necessity,' but instead in terms of a claim that a State may 'rationally consider'" (citation omitted)).

At bottom, Appellants' position is that the Voting Rights Act provides *less* justification for minor population variances than the interests just enumerated. That is, a state whose map departs from perfect population equality to follow county lines may overcome a one-person, one-vote challenge, but—Appellants contend—avoiding retrogression and obtaining preclearance under the Voting Rights Act cannot justify even the slightest variation. *See* Harris Br. 55.

This Court's opinions, however, leave no doubt that Arizona's interest in avoiding retrogression and achieving preclearance is at least as weighty. Eight Justices have endorsed the conclusion that compliance

with Section 5 is a *compelling* state interest, and thus necessarily a rational one. *LULAC*, 548 U.S. at 518 (Scalia, J., concurring in the judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.); *id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.). And, this Court has repeatedly assumed the same thing for the Voting Rights Act more generally. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion). It completely undermines all of this precedent to argue, as Appellants do, that achieving preclearance is not even a "legitimate" or "rational" state interest. *Reynolds*, 377 U.S. at 579.

Precedent aside, the Commission's decision to prioritize preclearance simultaneously furthered multiple state interests, each of which is at least "legitimate" and "rational." *Id.* Federal law required Arizona to obtain preclearance by demonstrating lack of retrogression. *Reno v. Bossier Parish School Board*, 520 U.S. 471, 478 (1997). Arizona's constitution reinforced the same obligation. Ariz. Const. art. IV, pt. 2, § 1(14)(A). Moreover, prioritizing preclearance furthered Arizona's sovereign authority over its elections. Had the Commission's plan been denied preclearance, it was exceedingly likely that a federal court would ultimately have drawn Arizona's legislative map, as occurred in the last redistricting cycle, at increased cost to Arizona's taxpayers. *See Navajo Nation v. Ariz. Indep. Redistricting Comm'n*,

230 F. Supp. 2d 998 (D. Ariz. 2002). A denial also would have reset the ten-year bail-out clock for Section 5's preclearance requirements. 52 U.S.C. § 10303(a)(l)(E). By contrast, emphasizing first-try preclearance kept the state's sovereign redistricting authority in the hands of the body the people of Arizona designated to draw the state's maps.

The Commission's decision to prioritize preclearance was legitimate, rational, and designed to realize a principle this Court has cogently stated time and again—that the "primarily ... political and legislative process" of reapportionment is properly kept with "those organs of state government selected" by the people, not "performed by federal courts." *Gaffney*, 412 U.S. at 749, 751; *see Connor*, 431 U.S. at 415 ("The federal courts ... possess no ... mandate to compromise sometimes conflicting state apportionment policies in the people's name.").[26]

2. The Contrary Arguments of Appellants And The Secretary Fail.

Appellants and the Secretary base their principal counterargument on a red herring. Appellants argue

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[26] This case is thus very different from *Alabama Legislative Black Caucus*, where the state operated under a fundamental misapprehension of what was required under Section 5 in believing that "it was required to maintain roughly the same black population percentage in existing majority-minority districts." *ALBC*, 135 S. Ct. at 1263; *see id.* at 1272-74 (explaining that the state's view was inconsistent with "what [the] Department of Justice Guidelines say" and with "§ 5's language [and] purpose"). Here, the Commission's approach accorded with that of the Justice Department and Section 5 itself.

that the "Voting Right Act d[id] not 'require ... population inequality in legislative districting,'" and, if it had, it would have been invalid as "contrary to the Constitution's guarantee of equal protection." Harris Br. 43-44 (quoting J.S. App. 131a); *see also* Secretary's Br. 39. Of course the Voting Rights Act did not *require* population inequality. The Voting Rights Act did, however, require Arizona to seek preclearance by demonstrating non-retrogression. *Bossier*, 520 U.S. at 478. That requirement is what drove the Commission's choice to draw ten ability-to-elect districts, minor population variations notwithstanding. The Commission's interest in achieving preclearance does not become less "legitimate" or "rational," *Reynolds*, 377 U.S. at 579, just because the Act leaves to states the specific means for showing non-retrogression, nor just because minor population deviations result in part from the attempt to achieve non-retrogression.

Appellants appear to contend that if the Commission had instead submitted a map that did not have ten ability-to-elect districts, the Justice Department would have been bound to preclear it if a plan with ten ability-to-elect districts would have required modestly larger population variation. Harris Br. 43. Put another way, Appellants seem to suggest that the Constitution would have required the Department to accept a retrogressive map if that was the only way to achieve perfect population equality. *See id.* But the one-person, one-vote principle did not require Arizona to skate as close to the edge as possible, risking denial of preclearance just for the sake of eliminating minor population variations that were

well within the *de minimis* variations regularly upheld by this Court.[27] The Justice Department's guidance reflects this settled precedent and flatly contradicts Appellants' view: It says that for "state legislative and local redistricting," the Department will not consider as "a reasonable alternative," a plan with "*significantly* greater overall population deviations." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011) (emphasis added).

As for Appellants' claim that interpretations other than their own would yield a constitutional violation, Harris Br. 44, it too rests on an incorrect premise: that the Constitution requires perfect equality in state legislative redistricting. If the Equal Protection Clause condemns minor variations in state legislative district populations at all, it does so only when variations are not "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. The Voting Rights Act is no more constitutionally suspect under this rule than, say, a state statute that requires adherence to county lines when minor population variations may result. *See, e.g.*, *Mahan* 410 U.S. at 319, 328 (approving Virginia map

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[27] This Court's racial gerrymandering cases are not to the contrary. *See* Harris Br. 49. In that context, the Court has held that when a state uses "racial classifications" to draw district lines, it does not have "a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Miller*, 515 U.S. at 922. Rather, the Court will independently scrutinize whether race-based remedies are necessary. *Id.* As Appellants conceded below, "this is not a racial gerrymandering case" and strict scrutiny does not apply. J.S. App. 64a.

with 16.4% variation based on "policy of respecting the boundaries of political subdivisions"); *Brown*, 462 U.S. at 843-44 (approving Wyoming's use of district with 60% deviation because of state's "constitutional policy . . . of using counties as representative districts and ensuring that each county has one representative").[28]

In contrast to Appellants, the Secretary acknowledges that preserving a minority group's ability to elect its preferred candidate can sometimes justify "deviat[ions] from the ideal population." Secretary's Br. 38 & n.18. The Secretary claims, however, that what the Commission did was nonetheless impermissible because it supposedly entailed *intentional* under-population, whereas "[e]quality must be the goal." Secretary's Br. 28. But as the Secretary appears to recognize, this attractive-sounding platitude is inconsistent with this Court's precedent. When a state prioritizes adhering to municipal lines or maintaining the cores of prior districts, rather than population equality, the state is *also* intentionally choosing larger population

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[28] For the same reason, Appellants miss the mark with their reliance on provisions of the Arizona constitution and Justice Department guidance that reaffirm adherence to the one-person, one-vote standard. Harris Br. 34-36; *see* Ariz. Const. art. IV, pt. 2, § 1(14)(B) ("State legislative districts shall have equal population to the extent practicable."); 76 Fed. Reg. at 7472 ("Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle."). These provisions track the federal constitutional standard in condemning only violations that are larger than those here and not "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579.

variances—yet, this Court has protected the states' ability to make these sovereign choices when variations are small. *See, e.g., Gaffney*, 412 U.S. at 749; *Mahan* 410 U.S. at 319, 328; *cf. Tennant v. Jefferson County Commission*, 133 S. Ct. 3, 8 (2012) (endorsing state's decision to permit larger variations in congressional plan because no alternative plan "came close to vindicating all . . . of the State's legitimate objectives . . . as well").

Undeterred, the Secretary insists that these Court-approved choices are distinguishable because they are made "in spite of" their "adverse effects" on population equality, whereas the Commission allegedly acted "because of" an impermissible intent to manipulate "the relative weight of . . . votes." Secretary's Br. 27, 43 n.20. The main problem with the Secretary's attempt to distinguish this Court's precedent is that this case falls on the wrong side of the line the Secretary draws. Let there be no mistake: The Commission did not act—and the district court certainly did not *find* that the Commission acted—with the purpose of affecting the relative weight of votes. Instead, the district court's finding, not properly challenged here, was that the Commission's purpose was (primarily) to obtain first-try preclearance and to avoid possible retrogression by drawing ten ability-to-elect districts. J.S. App. 23a-24a, 38a-39a.[29]

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[29] Appellants argue that even if the Commission's approach was generally permissible, it was inappropriate on the facts either because there were only seven "benchmark" ability-to-elect districts, Harris Br. 41, or because three of the Commission's asserted ability-to-elect districts did not actually qualify, Harris

To achieve this goal, the Commission shifted populations into and out of ability-to-elect districts. But the decisions to move population for the purpose of strengthening ability-to-elect districts in no way suggest the Commission intended to dilute votes. J.S. App. 30a-31a. Using under-population "as a tool" involves nothing more sinister than attempting to avoid retrogression. Secretary's Br. 39. And while the Commission would have known that the steps it took to strengthen ability-to-elect districts would affect population balances among the districts, Secretary's Br. 27, that is no different from a state following county lines with knowledge that doing so will affect population balances. *Id.*

Indeed, while the Secretary pretends that a bright line separates these districting decisions, the record here shows that they often merge in practice. For example, the Commission found that it could solidify LD4 as an ability-to-elect district *either* by splitting boundaries *or* by modestly reducing the district's population. Supp. App. 24-26. There is no reason the Commission was or should be required to choose the first option just because Section 5 preclearance was in play. *See Gaffney*, 412 U.S. at 748-49.

At bottom, there is no constitutionally significant difference between the Commission's choices and those

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Br. 45. The district court, however, found that the challengers had not provided "a basis to independently determine" the number of ability-to-elect districts and that they had "not carried their burden." J.S. App. 73a-74a. Appellants have not properly challenged that factual finding and there are no grounds for this Court to revisit it.

this Court has expressly approved. Indeed, the decisions line-drawers make to comply with federal law are informed and even constrained by the pursuit of other districting principles. The Secretary makes much of the requirement that states make "'an honest and good faith effort' at equal districts," Secretary's Br. 37 (quoting *Reynolds*, 377 U.S. at 577), but that command has always been limited to what is "practicable" in light of the "flexibility" that states have under this Court's precedent to pursue other legitimate redistricting interests—of which achieving preclearance is one. *Reynolds*, 377 U.S. at 577-78. Indeed, the Secretary's argument is particularly misguided here, where the evidence shows that the Commission went out of its way to *reduce* population variations before finalizing the map. Supp. App. 41-47. The Commission's choices fully complied with its obligations under the one-person, one-vote principle.[30]

In closing, the Secretary attempts to inject into this case a veiled racial gerrymandering claim, accusing the Commission of giving overriding weight to "racial and

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[30] The Secretary invokes *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50, 58 (1970), but that decision only underscores that this case does not involve the intentional discrimination that this Court has condemned. *Hadley* invalidated a Missouri statute that "automatically discriminate[d]" against voters in large school districts by providing that they would never receive representation proportional to their population. *Id.* Here, no identifiable set of districts received any automatic preference. The Commission considered factors relevant to Section 5 preclearance alongside the "[s]everal factors," *Reynolds*, 377 U.S. at 580, that states consider in the multifaceted process of reapportionment.

ethnic considerations" and seeking to create a "preferred class" of minority districts. Secretary's Br. 39, 43. But, again, the Court should not be fooled: The Commission did not make any illegitimate use of race, and the district court's factual findings do not support the Secretary's invented accusation. Rather, as explained, the Commission's focus was Section 5 preclearance (among other legitimate redistricting goals). *See supra* at 7-12. To achieve that goal, the Commission did exactly what this Court has instructed redistricting bodies to do—conducted a functional analysis using multiple factors to determine what was required to achieve minority ability-to-elect districts. *ALBC*, 135 S. Ct. at 1272-73. If the Secretary believed that the Commission had impermissibly let "race predominate[] over other redistricting criteria," Secretary's Br. 46, she had every chance to bring a racial gerrymandering claim. But she did not, and the challengers specifically *conceded* that "this is not a racial gerrymandering case." J.S. App. 64a. Given that, the Court should not be distracted by the Secretary's use of unsupported race-based innuendo.

C. *Shelby County* Does Not Call For The Invalidation Of All Redistricting Plans Drawn To Comply With Section 5.

Appellants, but not the Secretary, argue in the alternative that even if the Commission acted legitimately and reasonably when it drew Arizona's map following the 2010 census, this Court's decision in *Shelby County* invalidating the coverage formula in Section 4(b) of the Voting Rights Act somehow requires the map's invalidation now. Appellants claim

this is so because a "court must decide a case consistent with current law" by applying *Shelby County* retroactively, and—Appellants argue—permitting Arizona's current map to stand would "'give continuing force to Section 5 despite the unconstitutionality of applying it anywhere.'" Harris Br. 47 (quoting J.S. App. 125a).

Leaving aside the misstatement that *Shelby County* invalidated Section 5 (rather than the coverage formula in Section 4(b)), Appellants misunderstand how retroactivity works. *Shelby County* indisputably applies retroactively in that the Court will treat it "as a controlling statement of federal law" regarding the application of the coverage formula. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 93 (1993). But *Shelby County*'s controlling statement is irrelevant under the governing substantive law, which at most requires a showing that the map's modest variances resulted from action taken in "good faith" and "based on legitimate considerations incident to the effectuation of a rational state policy." *Reynolds*, 377 U.S. at 579. Maps that complied with this standard when drawn do not become invalid when facts or law change. Later population shifts and increases do not undermine a map properly drawn based on census data; and, if a state draws districts with population variations so as to avoid a contest between two incumbents, the map remains valid even if one retires. *See id.* at 583; *LULAC*, 548 U.S. at 421; *cf. Oyama v. California*, 332 U.S. 633, 683 n.8 (1948) (rational-basis inquiry looks at the "state of facts at the time the law was enacted" (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78

(1911))). Likewise here, so long as Arizona was required to seek preclearance, the Commission acted legitimately, rationally, and in good faith by working to achieve non-retrogression.[31]

Relying on *Shelby County* to invalidate Arizona's election map would be perverse. That decision overturned the coverage formula because the Court found it imposed unjustified burdens on the "residual sovereignty of the States" over their elections by subjecting them to federal oversight. 133 S. Ct. at 2623 (quotation marks omitted). Here, Arizona—via the Commission—made the choice that prioritizing preclearance best furthered its sovereignty under the governing legal regime by keeping the final decision on its map out of the hands of federal courts. *See supra* at 7-8. But now, Appellants ask this Court to mandate the very interference that Arizona sought to avoid. Nothing in *Shelby County* supports that result. To the contrary, despite Appellants' warnings of giving "continuing force" to a constitutional violation, Harris Br. 47, the only constitutional harm that *Shelby County* identified was one to Arizona's sovereignty—sovereignty that the Commission exercises for the people. *AIRC*, 135 S. Ct. at 2671. It is Arizona, not Appellants or the courts, who should decide whether

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[31] It is not unusual for the substantive standard to turn on the law in force when a government decisionmaker acted. *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (qualified immunity); *Illinois v. Krull*, 480 U.S. 340, 348-49 (1987) (search conducted under later-invalidated state statute).

and how the state should redraw its legislative maps in light of *Shelby County*.[32]

III. Appellants Ask This Court To Create A New Constitutional Rule Removing Politics From Redistricting.

Appellants' accusations that the Commission pursued a partisan agenda are also unavailing. First, Appellants rest their argument on a factual premise—that the deviations here resulted primarily from partisanship—that the district court rejected in findings Appellants cannot show are clearly erroneous. *Compare* Harris Br. 28-29, *with* J.S. App. 36a. Second, Appellants' legal position is untenable and irreconcilable with this Court's precedent. Though they disavow that they are bringing a partisan gerrymandering claim, Harris Br. 54, Appellants are essentially asking this Court to hold that a state is required to achieve *perfect* population equality as long as there were *any* partisan considerations involved with the drawing of district lines. Harris Br. 55. The Court should reject Appellants' invitation.

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[32] The district court decisions that Appellants cite do not apply *Shelby County* to invalidate maps lawfully adopted before that decision, as Appellants ask this Court to do. Instead, the defendants in those cases chose not to seek preclearance before *Shelby County*, and the courts applied that decision retroactively to reject claims that the defendants violated Section 5. *See Hall v. Louisiana*, 973 F. Supp. 2d 675, 684 (M.D. La. 2013); *Bird v. Sumter Cnty. Bd. of Educ.*, No. 1:12-CV-76-WLS, 2013 WL 5797653, at *3 (M.D. Ga. Oct. 28, 2013). That is far afield from the situation here.

A. The Trial Court Correctly Found That The Minor Deviations At Issue Were Not Motivated By Partisanship.

Appellants frame their first question presented as whether "the desire to gain partisan advantage for one political party [can] justify creating legislative districts of unequal population that deviate from the one-person, one-vote principle of the Equal Protection Clause?" That question is entirely hypothetical because it is not supported by the record in this case. As described above, the clear finding of the district court, after a full trial, was that the Commission was not trying to "gain partisan advantage for one political party" by creating districts with minor population deviations. Rather, the court found as fact that the population deviations resulted predominantly from the Commission's good-faith efforts to achieve preclearance under the Voting Rights Act. J.S. App. 36a.

The court below spent more than a year reviewing evidence and testimony presented at trial and voluminous public records of Commission proceedings. Based on this comprehensive review, the court determined that population deviations resulted from the Commission's honest pursuit of legitimate districting goals. Nonetheless, Appellants ask this Court to throw out the state's *entire* legislative map based on the lower court's subsidiary finding that, at most, "some of the commissioners were motivated in part in some of the linedrawing decisions by a desire to improve Democratic prospects in the affected districts." J.S. App. 6a; *cf. ALBC*, 135 S. Ct. at 1265 (requiring district-by-district analysis of legislature's

line-drawing decisions); Harris Br. 4. The court's subsidiary finding, however, was exceedingly narrow: that the evidence showed some commissioners entertained some partisan considerations only with respect to LD8. J.S. App. 41a-42a. And even as to that district, the court found that while "partisanship played some role," Appellants had not shown that "partisanship predominated over legitimate factors" in the design of that district. J.S. App. 79a.

Without a single citation to any record evidence of partisan motivation for any line drawn for any other district, Appellants are left with nothing more than a statistical correlation case. Echoing the dissent below, they rest their claim on the fact that most of the underpopulated districts have a plurality of registered Democrats. J.S. App. 120a. But this alone proves nothing. Given the correlation between racial and ethnic identity and party support in Arizona, it is no surprise that districts offering minorities the ability to elect candidates of choice *also* lean Democratic. J.S. App. 37a. In these circumstances, correlation alone does not show that partisan motivations predominated over other motivations (including Section 5 preclearance).

Yet as Appellants (and the dissenting judge below) would have it, they need show nothing other than a statistical correlation between population deviations and party registration in the districts. *See* J.S.A. 108a (dissent asserting that "the statistics of [the Commission's] plan are conclusive"); *id.* 120a (dissent stating that this case concerns "systematic population inequality for party advantage that is not only provable

but entirely obvious as a matter of statistics alone"). This Court has never endorsed the proposition that an equal protection violation can be established by nothing more than statistical correlation. *Cf. Tex. Dep't of Hous. v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015) (cautioning against the "serious constitutional questions that might arise" if "liability were imposed based solely on a showing of a statistical disparity"). That is particularly true when the statistical correlation is based on partisan affiliation. *See Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion) (questioning premise that the "only factor determining voting behavior at all levels is political affiliation").

Moreover, even if the correlation between district population and partisan affiliation were probative, Appellants have no evidence of invidious partisan intent. As Judge Silver pointed out below, *the Commission's map is not biased in favor of Democrats.* J.S. App. 98a. To the contrary, the map's partisan distribution fairly reflects the partisan distribution of registered voters in the state, and even has a slight pro-Republican tilt. *Id.* The map leaves the Republican Party firmly in control of a majority of the seats in Arizona's House and Senate, likely for the rest of the decade. *See id.*; Supp. App. 8-9. Appellants' suggestion that the Commission engaged in a kind of covert partisan gerrymandering, using population deviations to achieve that goal, is thus doubly unfounded.

B. Appellants Ask This Court To Create A New Rule Under Which Any Redistricting Plan With Any Minor Deviation Can Be Challenged On The Ground That It Is Motivated By Partisanship.

Appellants' position boils down to an implausible proposition: if a plaintiff shows any amount of partisan motivation, however small and localized, then any population deviation in a state legislative map renders the map unconstitutional. Harris Br. 54-55. That is not, and should not become, the law.

To be sure, Appellants deny they are making a partisan gerrymandering claim. Harris Br. 54 ("This is not a political gerrymandering case."). But they contend that the presence of *any* partisan motivation during the line-drawing process requires the correction of *any* population deviation. No "deviation from the ideal" can be tolerated, Appellants argue, if the motives for such a minor deviation were tainted in any way by political considerations. Harris Br. 55.

Such a rule cannot be squared with this Court's precedent. The goal cannot be to eradicate *all* partisan considerations from the process whenever populations of districts depart from strict equality. Indeed, this Court has specifically endorsed the use of partisan considerations in redistricting to achieve partisan fairness. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), this Court upheld a state legislative redistricting map with population deviations greater than those at issue here, where it was admitted that "virtually every Senate and House district line was drawn with the

conscious intent to create a districting plan that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752. Far from finding these partisan considerations problematic, this Court instead found that "judicial interest should be at its lowest ebb when a state purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Id.* at 754.

With respect to their proposed rule, Appellants draw no distinction between the use of partisanship in a case like *Gaffney*, which concerned a good-faith effort to achieve partisan fairness and balance, and the use of partisanship in a case like *Larios*, which concerned a bad-faith effort to achieve unfair partisan gain. Instead, Appellants seek to banish any consideration of partisanship in districting (despite their disclaimers otherwise). But as Justice Scalia noted in his dissent from the summary affirmance in *Larios*, there is every reason to treat "'politics as usual'" as a traditional and constitutional redistricting criterion, so long as it does not go too far. *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia J., dissenting); *see Vieth*, 541 U.S. at 285-86 (plurality opinion) ("The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics."). Just last Term, this Court recognized as much, listing "political affiliation" along with "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests," and "incumbency protection," as one

of the "traditional" districting criteria. *ALBC*, 135 S. Ct. at 1270 (internal quotation marks omitted); *see also, e.g., Hunt v. Cromartie*, 526 U.S. 541, 549-51 (1999); *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (accepting as legitimate state's justification that predominant motive for drawing district lines was politics, not race).

Ignoring that the Court has already soundly rejected the contention that "any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it," *Gaffney*, 412 U.S. at 752, Appellants propose that a court, upon identifying even the slightest population deviation, "inquire into the justification for the deviation." Harris Br. 55. According to Appellants, if the court's review suggests that the deviation was "to achieve an end that is not legitimate (such as gaining partisan advantage or obtaining preclearance under the Voting Rights Act formula this Court has declared to be unconstitutional), this Court should invalidate that scheme as violating the Equal Protection Clause." *Id.* But this approach would lead to circumstances exactly like those Justice Scalia predicted in his *Larios* dissent and be far "more likely to encourage politically motivated litigation than to vindicate political rights." 542 U.S. at 952 (Scalia J., dissenting).

In Appellants' view, where a state's legislative map deviates from perfect equality (even slightly), and *some* aspect of the deviation resulted in *some* part from *some* partisan motivation by *some* individual responsible for redistricting, that map is subject to judicial scrutiny and invalidation. The most obvious problem with this

theory is that it would likely invalidate nearly *every* state legislative apportionment plan drawn by a political body like a legislature. Virtually all such plans contain minor population deviations; indeed, more than twenty states' house or senate plans currently deviate from the ideal population more than does Arizona's.[33] And given how pervasive are partisan considerations in redistricting, *Larios*, 542 U.S. at 952 (Scalia J., dissenting), some of the disparity-increasing lines will inevitably result at least in part from partisan motivation. Thus, notwithstanding Appellants' protestations, nearly every legislative map nationwide would be at risk from their proposed rule.

For that reason, Appellants' proposed rule inevitably would push redistricters to eliminate all population deviations. This result would be inimical to decades of law regarding state legislative redistricting. *See Reynolds*, 337 U.S. at 561 (the rights at stake in one-person, one-vote cases are "individual and personal in nature" and must be considered accordingly). Even with regard to population variations in congressional districts, which are subject to closer scrutiny than are variations in state legislative maps, this Court has emphasized that legitimate state interests can justify departures from perfect population equality. *Tennant v. Jefferson County Commission*, 133 S. Ct. 3 (2012). But under the legal regime proposed here, anyone drawing a state legislative map would know it is folly to

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[33] *See* National Conference of State Legislatures, 2010 NCSL Congressional and State Legislative Redistricting Deviation Table, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Oct. 21, 2015).

tolerate any deviations because of the danger that they might be found to be motivated in part by someone's political interests. The practice of "zeroing out" districts—thus far limited to congressional district maps—would thus have to become the norm for state and local maps as well.

Appellants' proposed rule is not just boundless, but pointless. Even if partisanship in redistricting is a concern, it is entirely possible to draw egregious partisan gerrymanders with no population deviation at all. It would be a strange legal system indeed that blessed the map in a case like *Vieth*, where line-drawing that achieved perfect population equality also made it likely that one party could carry nearly two-thirds of the seats with one half of the votes, while invalidating a map like the one at issue here, which allocates districts between the two major parties fairly, but happens to have small disparities of population among the districts.

* * *

Appellants claim their proposed rule will "not require this Court to jump into the 'political thicket' and engage in a standardless supervision of state reapportionment." Harris Br. 53. But as the foregoing shows, that is exactly what will happen. Federal courts necessarily will be drawn deep into the political thicket to adjudicate whether state legislative motives were "legitimate" as to every line in every district in which there is even the slightest population deviation. "That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should

become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 U.S. at 749-50. The Court should reject Appellants' invitation to radically rewrite the one-person, one-vote doctrine.

CONCLUSION

The decision of the United States District Court for the District of Arizona upholding the Commission's state legislative redistricting plan should be affirmed.

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Respectfully submitted:

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ADDENDUM

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFCATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other

crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

52 U.S.C. § 10304

§ 10304. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the first sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the second sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 10303(a) of this title based upon determinations made under the third sentence of section 10303(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of

Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would

otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.

Ariz. Const. art IV, pt. 2 § 1 (in relevant part)

> **§ 1. Senate; house of representatives; members; special session upon petition of members congressional and legislative boundaries; citizen commissions.**

(1) The senate shall be composed of one member elected from each of the thirty legislative districts established pursuant to this section. The house of representatives

shall be composed of two members elected from each of the thirty legislative districts established pursuant to this section.

. . .

(3) By February 28 of each year that ends in one, an independent redistricting commission shall be established to provide for the redistricting of congressional and state legislative districts. The independent redistricting commission shall consist of five members. No more than two members of the independent redistricting commission shall be members of the same political party. Of the first four members appointed, no more than two shall reside in the same county. Each member shall be a registered Arizona voter who has been continuously registered with the same political party or registered as unaffiliated with a political party for three or more years immediately preceding appointment, who is committed to applying the provisions of this section in an honest, independent and impartial fashion and to upholding public confidence in the integrity of the redistricting process. Within the three years previous to appointment, members shall not have been appointed to, elected to, or a candidate for any other public office, including precinct committeeman or committeewoman but not including school board member or officer, and shall not have served as an officer of a political party, or served as a registered paid lobbyist or as an officer of a candidate's campaign committee.

. . .

(5) By January 8 of years ending in one, the commission on appellate court appointments or its designee shall establish a pool of persons who are willing to serve on and are qualified for appointment to the independent redistricting commission. The pool of candidates shall consist of twenty-five nominees, with ten nominees from each of the two largest political parties in Arizona based on party registration, and five who are not registered with either of the two largest political parties in Arizona.

. . .

(6) Appointments to the independent redistricting commission shall be made in the order set forth below. No later than January 31 of years ending in one, the highest ranking officer elected by the Arizona house of representatives shall make one appointment to the independent redistricting commission from the pool of nominees, followed by one appointment from the pool made in turn by each of the following: the minority party leader of the Arizona house of representatives, the highest ranking officer elected by the Arizona senate, and the minority party leader of the Arizona senate.

. . .

(8) At a meeting called by the secretary of state, the four independent redistricting commission members shall select by majority vote from the nomination pool a fifth member who shall not be registered with any

party already represented on the independent redistricting commission and who shall serve as chair.

. . .

(14) The independent redistricting commission shall establish congressional and legislative districts. The commencement of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below.

A. Districts shall comply with the United States Constitution and the United States voting rights act;

B. Congressional districts shall have equal population to the extent practicable, and state legislative districts shall have equal population to the extent practicable;

C. Districts shall be geographically compact and contiguous to the extent practicable;

D. District boundaries shall respect communities of interest to the extent practicable;

E. To the extent practicable, district lines shall use visible geographic features, city, town, and county boundaries, and undivided census tracks;

F. To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to the other goals.

. . .

(15) Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals. The places of residence of incumbents or candidates shall not be identified or considered.

. . .

(16) The independent redistricting commission shall advertise . . . a draft map of legislative districts to the public for comment, which comment shall be taken for at least thirty days. . . . The independent redistricting commission shall then establish final district boundaries.